

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARCELLA ROSE, an individual, ) Case No.: 11cv00240 AJB (KSC)  
Plaintiff, )  
v. ) ORDER:  
SEAMLESS FINANCIAL CORPORATION ) (1) DENYING DEFENDANT'S MOTION  
INC., a Nevada Corporation; MICHAEL ) TO DISMISS PLAINTIFF'S THIRD  
MCDEVITT, an individual; CHAD ) AMENDED COMPLAINT; AND  
HAGOBIAN, an individual; JEAN-PIERRE ) (2) DENYING DEFENDANT'S MOTION  
RADTKE, an individual; PREMIERE ) FOR RULE 11 SANCTIONS  
CAPITAL ESCROW, INC., a California )  
corporation; LUIS ANTONIO VENEGAS, an ) (Doc. No. 76)  
individual; and DOES 1-100, )  
Defendants. )  
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Presently before the Court are Defendant Chad Hagopian's ("Defendant" or "Hagopian") motion to dismiss Plaintiff's Third Amended Complaint and motion for sanctions pursuant to Rule 11. (Doc. No. 76.) Plaintiff filed a response in opposition on November 26, 2012, (Doc. No. 78), and Defendant filed a reply on December 10, 2012, (Doc. No. 80). On December 21, 2012 the Court took both motions under submission and vacated the hearing scheduled for January 10, 2013. (Doc. No. 83.) For the reasons set forth below, the Court **DENIES** Defendant's motion to dismiss and **DENIES** Defendant's motion for Rule 11 sanctions pursuant.

## **BACKGROUND**

## I. Factual Background

On or around April 2008, Plaintiff Marcella Rose (“Plaintiff”) executed a loan in the amount of \$510,000 (the “Loan”).<sup>1</sup> The Loan was secured by a first deed of trust on the property located at 3665 Trenton Avenue, San Diego, California 92117 (the “Property”). (Doc. No. 78, Ex. 3, p. 4.) Prior to executing the Loan, Plaintiff alleges that on or about April 8, 2009, Premiere Capital Escrow, Inc. (“Premiere”) requested a preliminary title report on the Property through Ms. Evelyn Ortega. Plaintiff then received a telephone call from Michael McDevitt (“McDevitt”), an individual employed by Seamless Financial Corporation, Inc. (“Seamless”). (TAC, Doc. No. 74 ¶ 19.) McDevitt requested information from Plaintiff regarding the possibility of refinancing the loan on her current mortgage. (*Id.*)

During initial conversations between McDevitt and Plaintiff, Plaintiff disclosed that she had a savings account containing approximately \$85,000. (*Id.* ¶ 20.) Plaintiff also provided McDevitt with proof of income showing she received monthly social security benefits in the amount of \$1,077, and pension payments in the amount of \$338.83. (*Id.*) McDevitt then informed Plaintiff that if she could contribute \$27,000 from her saving account up front, she could get a loan with a 3.75% interest rate fixed for fifteen years. (*Id.* ¶ 24.) Plaintiff further alleges that Seamless, through Ms. Grosser (“Grosser”), Mr. Radtke (“Radtke”), and/or McDevitt, caused Plaintiff’s loan application to state that her monthly income was \$9,600 (\$7,800 from her pension and retirement and \$1,800 a month in pension benefits) and forged her signature on the typewritten loan application documents to falsely state her monthly income to ensure she would qualify for the Loan. (*Id.* at ¶ 23.)

After the Loan documents were finalized, Plaintiff made payments on the Loan for over a year. Plaintiff then became aware that her Loan was in fact a “Pick-A-Payment” mortgage rather than a loan with a fixed interest rate of 3.75%.<sup>2</sup> (*Id.* ¶ 26.) Soon thereafter, the Loan payments became unaffordable and Plaintiff defaulted on the Loan. (*Id.* ¶ 26-29.) On August 11, 2009, after several unsuccessful

<sup>1</sup>The Loan was originally obtained from Wachovia Mortgage, FSB (“Wachovia”) and later transferred to Wells Fargo Bank, NA (“Wells Fargo” ) as a result of a merger.

<sup>2</sup> Plaintiff further alleges that her “Pick-A-Payment” mortgage loan was an Option Adjustable Rate Mortgage (“ARM”), which had a variable rate feature, payment caps, and charged a much greater interest rate than Plaintiff was originally promised by McDevitt. (Doc. No. 74 ¶ 26.)

1 attempts to modify the terms of Plaintiff's Loan, foreclosure proceeding commenced against the  
 2 Property. (*Id.* ¶ 30.) Shortly thereafter, the Property was sold in a short sale to avoid foreclosure. (*Id.*)

## 3 **II. Procedural Background**

4 Plaintiff originally filed this action in state court on December 29, 2010, against Defendants  
 5 Wachovia, Wells Fargo, Seamless, McDevitt, and Hagopian (collectively, "Defendants"). (Doc. No. 1.)  
 6 The complaint contained six causes of action: (1) violation of the Real Estate Settlement Procedures  
 7 Act, 12 U.S.C. § 2605 ("RESPA"); (2) violation of the Federal Fair Debt Collection Practices Act, 15  
 8 U.S.C. § 1692 ("FDCPA"); (3) violation of the California Rosenthal Fair Debt Collection Practices Act,  
 9 Cal. Civ. Code §§ 1788 *et seq.* ("Rosenthal Act"); (4) unfair competition under California Business and  
 10 Professions Code §§ 17200 *et seq.* ("UCL"); (5) fraud and deceit; and (6) violation of the Elder Abuse  
 11 and Dependent Adult Civil Protection Act, Cal. Welfare & Institutions Code § 15610.30 (the "Elder  
 12 Abuse Act"). The first, second, and third causes of action were alleged solely against Wachovia and  
 13 Wells Fargo, whereas the remaining state law causes of action were alleged against all Defendants. (*Id.*)

14 On February 4, 2011, Defendants removed this action to federal court on the basis of federal  
 15 question jurisdiction and supplemental jurisdiction over the related state law claims. (*Id.*) On February  
 16 11, 2011, Defendant Wells Fargo filed a motion to dismiss the complaint, (Doc. No. 2), which was  
 17 subsequently denied as moot after Plaintiff filed a First Amended Compliant ("FAC"). (Doc. No. 7.)  
 18 On March 18, 2011, Wells Fargo moved to dismiss Plaintiff's FAC, (Doc. No. 13.), and on May 25,  
 19 2011, Plaintiff and Hagopian filed a joint motion for an extension of time for Hagopian to respond to the  
 20 FAC.<sup>3</sup> (Doc. No. 23.) While Wells Fargo's motion to dismiss was pending, Wells Fargo and Plaintiff  
 21 entered into a good faith settlement. (Doc. No. 32.) The settlement was approved by the Court on  
 22 March 2, 2012, (Doc. No. 50), and Wells Fargo and the federal causes of action alleged against Wells  
 23 Fargo were thereby dismissed, (Doc. No. 56).

24 Plaintiff filed a Second Amended Complaint ("SAC") on April 2, 2012. (Doc. No. 53.) The  
 25 SAC alleged four causes of action: (1) violation of the Elder Abuse Act; (2) fraud and deceit; (3) breach  
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27       <sup>3</sup> The parties disagree over the purpose of the joint motion. Plaintiff alleges the stipulation was  
 28 entered into in "an effort to avoid Mr. Hagopian [from] filing a motion to dismiss," (Doc. No. 78, p. 3:2-3), and Hagopian alleges the stipulation was entered into because Plaintiff "acknowledged that the FAC was frivolous and agreed to amend her complaint." (Doc. No. 76, p. 5:13-14.)

of fiduciary duty; and (4) unlawful, unfair, and deceptive practices under the UCL.<sup>4</sup> (Doc. No. 53.) On May 1, 2012, Defendant Hagopian filed a motion to dismiss the SAC, (Doc. No. 59), and on June 1, 2012, Plaintiff filed a motion to remand, (Doc. No. 61). On September 10, 2012, the Court denied Plaintiff's motion to remand and granted in part and denied in part Defendant's motion to dismiss the SAC. (Doc. No. 73.) The Court granted Hagopian's motion to dismiss with respect to the first three causes of action without leave to amend, and granted the motion with leave to amend with respect to the fourth cause of action alleging violation of the UCL. Plaintiff filed a Third Amended Complaint ("TAC") on October 10, 2012. (Doc. No. 74.) On November 2, 2012, Defendant filed the two motions presently before the Court. (Doc. No. 76.) Each will be discussed in turn.

## DISCUSSION

### I. Motion to Dismiss

Hagopian argues the Court should dismiss the only remaining cause of action alleged against him in the TAC because it is unintelligible, pled without particularity, and cannot be advanced based solely on his position as the designated broker of Seamless. For the reasons set forth below, the Court finds Plaintiff has pled sufficient facts—at this stage in the proceedings—to allege an agency relationship between Hagopian and Radtke, and a plausible claim for relief under the unlawful, unfair, and fraudulent prongs of the UCL based on an alleged violation of TILA.

#### A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint must therefore provide a defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court may dismiss a complaint as a matter of law for: (1) “lack of cognizable legal theory,” or (2) “insufficient

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<sup>4</sup> The SAC named Seamless, McDevitt, Hagopian, Radtke, Premiere, and Luis Antonio Venegas (“Venegas”) as defendants. Defendants Radtke, Premiere, and Venegas were added as additional defendants by Plaintiff for the first time in the SAC.

1 facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780,  
 2 783 (9th Cir. 1996) (citation omitted). However, a complaint survives a motion to dismiss if it contains  
 3 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

4 Notwithstanding this deference, the reviewing court need not accept “legal conclusions” as true.  
 5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). It is also improper for the court to assume “the [plaintiff] can  
 6 prove facts that [he or she] has not alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State*  
 7 *Council of Carpenters*, 459 U.S. 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded  
 8 factual allegations, a court should assume their veracity and then determine whether they plausibly give  
 9 rise to an entitlement to relief.” *Iqbal*, 129 S.Ct. at 1950. The court only reviews the contents of the  
 10 complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the  
 11 nonmoving party. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009) (citations omitted).

12 Federal Rule of Civil Procedure 9(b) states that an allegation of “fraud or mistake must state with  
 13 particularity the circumstances constituting the fraud.” The “circumstances” required by Rule 9(b) are  
 14 the “who, what, when, where, and how” of the fraudulent activity. *Vess v. Ciba-Geigy Corp. USA*, 317  
 15 F.3d 1097, 1106 (9th Cir. 2003); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“[Rule 9(b)  
 16 requires] the times, dates, places, benefits received, and other details of the alleged fraudulent activ-  
 17 ity.”). In addition, the allegations “must set forth what is false or misleading about a statement, and why  
 18 it is false.” *Vess*, 317 F.3d at 1106. Rule 9(b)’s heightened pleading standard applies not only to federal  
 19 claims, but also to state law claims brought in federal court. *Id.* at 1103. This heightened pleading  
 20 standard ensures that “allegations of fraud are specific enough to give defendants notice of the particular  
 21 misconduct which is alleged to constitute the fraud charged so that they can defend against the charge  
 22 and not just deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th  
 23 Cir. 1985); *Concha v. London*, 62 F.3d 1493, 1502 (9th Cir. 1995).

#### 24       B.     Defendant Hagopian’s Liability under the UCL

25 Hagopian’s primary contention is that he is neither directly or vicariously liable for any of the  
 26 alleged wrongful conduct. Hagopian argues he is not directly liable because he was not Plaintiff’s  
 27 broker, had no direct contact with Plaintiff, and did not review Plaintiff’s Loan documents. Second, and  
 28 more hotly contested in the instant motion, Hagopian argues he is not vicariously liable for any of the

1 alleged wrongdoing because, as a matter of law, a “designated broker” is not personally liable for the  
 2 failure to supervise corporate employees, and Plaintiff has not sufficiently pled the existence of an  
 3 agency relationship.

4       This precise issue was considered by the United States Supreme Court on appeal from the Ninth  
 5 Circuit in *Meyer v. Holley*, 537 U.S. 280 (2003), reconsidered by the Ninth Circuit on remand in *Holley*  
 6 *v. Crank*, 400 F.3d 667 (9th Cir. 2005) (*Holley II*), and recently analyzed in a case similar to the present  
 7 action by the California Court of Appeal in *Sandler v. Sanchez* (2012) 206 Cal. App. 4th 1431. Based  
 8 on this case law, it is now well established that a designated broker is not personally liable for the acts of  
 9 corporate employees based “solely” on his or her failure to supervise. *Sandler*, 206 Cal. App. 4th at  
 10 1444-45. However, a designated broker may be held vicariously liable for the misconduct of corporate  
 11 employees in accordance with traditional agency principles. *Meyer*, 537 U.S. at 291-92. Because this  
 12 issue is central to Hagopian’s present motion, the Court sets forth the governing law regarding real  
 13 estate brokers, followed by the standard for pleading vicarious liability at the motion to dismiss stage.

14           **1. Governing Law Regarding Real Estate Brokers**

15       In California both corporations and individuals are required to be licensed to operate as real  
 16 estate brokers.<sup>5</sup> *See* Cal. Bus. & Prof. Code §10006. However, if a corporation holds a real estate  
 17 broker license it must delegate to an officer of the corporation to serve as the “designated broker.” *See*  
 18 Cal. Bus. & Prof. Code §§ 10158, 10211; *see also* Cal. Code Regs., tit. 10, § 2740 (“[n]o acts for which  
 19 a real estate license is required may be performed for or in the name of, a corporation when there is no  
 20 officer of the corporation” licensed under § 10211). Under Section 10159.2(a), the designated broker is  
 21 “responsible for the supervision and control of the activities conducted on behalf of the corporation by  
 22 its officers and employees . . . including the supervision of salespersons licensed to the corporation in  
 23 the performance of acts for which a real estate license is required.” Failure to comply with Section

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28       <sup>5</sup> California defines a real estate broker as a person who, for a compensation or in expectation of a compensation, assists people in certain statutorily defined licensed activity, including soliciting borrowers or lenders or performing services for borrowers or lenders in connection with loans secured by real property. *See* § 10131, subds.(a), (d).

1 10159.2 is grounds for the Real Estate Commission to suspend or revoke the designated broker's real  
 2 estate license. *See Cal. Bus. & Prof. Code §10177(h).*<sup>6</sup>

3 In *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001) (*Holley I*), *rev'd*, 537 U.S. 280 (2003), the  
 4 Ninth Circuit reversed the decision of the district court, and held that a designated broker may be held  
 5 vicariously liable for an employee's violations of the Fair Housing Act, based solely on the designated  
 6 broker's ability to direct or control the conduct of the employee.<sup>7</sup> In doing so, the *Holley I* court relied  
 7 on Section 10159.2, and the purpose and express language of the Fair Housing Act, stating that: "If  
 8 Meyer was indeed an officer of the corporation and the designated officer/broker of Triad Realty at the  
 9 time of the alleged conduct, it is difficult to see how he could be excused from the obligation imposed  
 10 by the [Fair Housing Act] to prohibit discrimination in the housing field." 258 F.3d 1127, 1135. The  
 11 Supreme Court reversed, finding that nothing in the Fair Housing Act suggested a congressional intent  
 12 to expand traditional principles of vicarious liability. *Meyer*, 537 U.S. at 286. The Supreme Court held  
 13 that Section 10159.2's duty to supervise was not—by itself—sufficient to create a principal-agent  
 14 relationship between a designated broker and the corporation's employees. *Id.* at 290-91 ("the 'right to  
 15 control' is insufficient by itself, under traditional agency principles, to establish a principal/agent or  
 16 employer/employee relationship."). However, because the Ninth Circuit did not address "whether other  
 17 aspects of the California broker relationship, when added to the 'right to control,' would, under  
 18 traditional legal principles and consistent with the 'general common law of agency,' establish the  
 19 necessary relationship," the Supreme Court did not consider what facts were necessary to create an  
 20 agency relationship in this context. *Id.* at 292.

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 23       <sup>6</sup> Prior to the enactment of Section 10159.2 there was not an explicit duty on behalf of the  
 24 designated broker to supervise the corporate broker's employees. In March 1979, the Department of  
 25 Real Estate sponsored legislation to add Sections 10159.2 and 10177(h), which made the designated  
 26 broker statutorily responsible for supervision of the corporation's employees, and subject to discipline  
 27 for the breach of such duty. *See Historical and Statutory Notes*, 4B West's Ann. Bus. & Prof. Code  
 28 (2008 ed.) foll. § 10177 p. 194.

29       <sup>7</sup> In the *Holley* line of cases, an interracial couple sued their corporate real estate broker, Triad,  
 30 and Triad's designated officer, David Meyer, alleging Triad's real estate salesperson, Grove Crank,  
 31 violated racial discrimination prohibitions in the federal Fair Housing Act. The complaint sought to  
 32 hold Meyer, who was also the owner and president of Triad, and Triad itself vicariously responsible for  
 33 Crank's violation. The case originated in the Central District of California, 1999 WL 34789281 (C.D.  
 34 Cal. Jul. 26, 1999).

1       On remand, the Ninth Circuit considered the question left unresolved by the Supreme  
 2 Court—whether, based on all the evidence presented on summary judgment, the designated broker  
 3 (Meyer) could be held liable for the corporate employee’s (Crank) unlawful conduct under traditional  
 4 agency principles. *Holley*, 400 F.3d 667, 669 (9th Cir. 2004) (*Holley II*). After considering all the  
 5 evidence, the *Holley II* court held that an agency relationship was present between Crank and Meyer,  
 6 such that Meyer could be held vicariously liable for the unlawful conduct of Crank. *Id.* at 673-74. The  
 7 *Holley II* court based this determination in part on the fact that Meyer intended to turn the real estate  
 8 enterprise over to Crank to pursue an alternate career; Meyer understood his supervisory duty under  
 9 California law and agreed to delegate such duties to Crank; and Crank agreed to carry out this duty on  
 10 behalf of Meyer, subject only to Meyer’s ultimate control. *Id.*

11       The California Court of Appeal recently considered a similar issue in *Sandler v. Sanchez*,  
 12 wherein the plaintiff attempted to impose vicarious liability on a designated broker by alleging that the  
 13 broker “implicitly” agreed to delegate his duty to supervise to a corporate employee. *Sandler v. Sanchez*  
 14 (2012) 206 Cal. App. 4th 1431, 1445. Pleading facts similar to those alleged in the *Holley* line of cases,  
 15 the plaintiff in *Sandler* argued that because the designated broker had no involvement in the day-to-day  
 16 activities of the corporation, he effectively lent his license to the corporation, which in essence delegated  
 17 his statutory duty to supervise. *Id.* Accordingly, the plaintiff in *Sandler* argued that if the alleged  
 18 wrongful conduct was committed by the corporate employee within the scope of the agency, the  
 19 designated broker should be held vicariously liable. *Id.* The Court of Appeal rejected the plaintiff’s  
 20 analogy, finding that to the extent the Ninth Circuit found an “express agreement” between Meyer and  
 21 Crank, it did so based on the Supreme Court’s finding that “more is needed to create such a unique  
 22 agency relationship between two employees than the [designated broker’s] mere inaction.” *Id.* (“Even  
 23 if such a relationship could exist, as the United States Supreme Court explained, more is needed to  
 24 create such a unique agency relationship between two employees than the officer’s mere inaction.”)

25       Based on the above mentioned cases, imposition of liability on a designated broker depends on  
 26 whether or not an agency relationship has been created between the designated broker and the corporate  
 27 employee alleged to have committed the unlawful conduct. Mere inaction on behalf of the designated  
 28 broker, or allegations of an “implicit agreement” is not sufficient. *Id.*

1                   **2. Vicarious Liability and Agency Principles**

2                 As a general rule, corporate employers may be held vicariously liable for the acts of their agents  
 3 committed within the scope of the agency or employment. *See Perez v. Van Groningen & Sons, Inc.*  
 4 (1986) 41 Cal.3d 962, 967. However, absent an independent agency relationship, it is the corpora-  
 5 tion—not its owner or officer—that is subject to vicarious liability for the unlawful conduct committed  
 6 by its agents or employees. *See Holley*, 537 U.S. at 286 (“[a] corporate employee typically acts on  
 7 behalf of the corporation not its owner or officer”); *United States Liability Ins. Co. v. Haidinger-Hayes,*  
 8 *Inc.* (1970) 1 Cal.3d 586, 595 (same).

9                 Under traditional agency principles, a principal may be liable for the acts of his agent if the  
 10 principle consents to the “agent acting on his behalf and subject to his control, and the agent [consents]  
 11 to act for the principal.” *Holley II*, 400 F.3d at 673; Restatement (2d) of Agency § 1. Accordingly, the  
 12 “ordinary principal/agency relationship demands not only control (or the right to direct or control) but  
 13 also ‘the manifestation of consent by one person to another that the other shall act on his behalf . . . and  
 14 consent by the other so to act.’” *Nevis v. Wells Fargo Bank*, 2009 WL 1458042 \* 4 (N.D. Cal. May 26,  
 15 2009) (citing *Holley*, 537 U.S. at 286). Thus, in the designated broker context, the designated broker’s  
 16 right to control the employee/salesperson is not enough; there must be a finding of an explicit agreement  
 17 between the principal and the agent. *Holley*, 537 U.S. at 291. 292; *Holley II*, 400 F.3d at 670-75.<sup>8</sup>

18                   **3. Hagopian May be Vicariously Liable For the Unlawful Conduct of Radtke**

19                 Here, Plaintiff does not allege any actual misconduct on behalf of Hagopian in the solicitation,  
 20 preparation, or execution of Plaintiff’s Loan. Nor does Plaintiff allege that Hagopian was aware of the  
 21 alleged wrongful conduct and ratified such conduct after the fact. Instead Plaintiff argues that Hagopian  
 22 is vicariously liable for the alleged misconduct because: “Mr. Hagopian consented to Mr. Radtke acting  
 23 on Mr. Hagopian’s behalf, and [] Mr. Radtke consented to act for Mr. Hagopian . . .” (TAC ¶ 8.) Thus,  
 24 Plaintiff alleges that because there was an actual agreement between Hagopian and Seamless—that  
 25 Hagopian would review loan documents each week, and Radtke and Noland Nelson would be responsi-  
 26 ble for the day-to-day supervision of the corporations employees, including McDevitt—Hagopian is

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 28                 <sup>8</sup> The Supreme Court also noted that an agency relationship could exist under a “piercing the  
 corporate veil” or “independent contractor” theory. *Meyer*, 537 U.S. at 291. However, the Court need  
 not address these as Plaintiff does not raise factual allegations that would support either claim.

1 vicariously liable for other Defendants, more specifically Radtke's, failure to comply with TILA.<sup>9</sup>  
 2 (Dickenson Decl. ¶3.) Moreover, Plaintiff distinguishes *Sandler v. Sanchez* (2012) 206 Cal. App. 4th  
 3 1431, a case relied on by Hagopian, stating that where the plaintiff in *Sandler* alleged an "implicit"  
 4 agreement between the designated broker and the corporate employee, here Plaintiff alleges there was  
 5 an "actual" agreement between Hagopian and Radtke to ensure compliance with TILA.<sup>10</sup> (Doc. No. 78,  
 6 p. 11.)

7 Therefore, although Hagopian ardently contends that Plaintiff raises the notion of an agency  
 8 relationship between Hagopian and Radtke as a "sham" to "artfully" plead around the clear bar to  
 9 recovery against Hagopian, the Court finds Plaintiff has sufficiently plead—at this stage in the  
 10 proceeding—an agency relationship between Hagopian and Radtke. *Seneris v. Haas* (1955) 45 Cal.2d  
 11 811, 831 ("Unless the evidence is susceptible of but a single inference, the question of agency is one of  
 12 fact for the jury"); *Dion LLC v. Infotek Wireless, Inc.*, No. C07-1431 SBA, 2007 WL 3231738 at \*4  
 13 (N.D. Cal. Oct. 30, 2007) (denying motion to dismiss vicarious liability claim where plaintiffs alleged  
 14 agency relationship between parties without additional factual allegations); *but compare Hawkins v.*  
 15 *First Horizon Home Loans*, 2010 WL 4823808 (E.D. Cal. Nov. 22, 2010) ("[P]laintiffs do not allege any  
 16 facts to show how Horizon authorized any other defendant to represent and/or bind it. Plaintiffs must  
 17 allege such facts to sufficiently apprise defendants of the nature of the agency relationship.").  
 18 Accordingly, even though Hagopian is not directly liable under Cal. Bus. & Prof. Code § 10240,  
 19 because Seamless, and not Hagopian was Plaintiff's broker, Plaintiff's claim under the UCL, and more  
 20 specifically alleged violations of TILA, may proceed under a theory of vicarious liability.

### 21       C.     Unfair Competition Under California Business and Professions Code § 17200

22 Plaintiff alleges Hagopian violated the UCL by failing to ensure the TILA disclosures  
 23 ("TILDS") provided to Plaintiff were clear and conspicuous. Section 17200, also known as California's  
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25       <sup>9</sup> Plaintiff must be cognizant however that she has only alleged an explicit agency agreement  
 26 between Radtke and Hagopian.

27       <sup>10</sup> Hagopian contends there was no such agreement. (Doc. No. 80, p. 9 n. 7.) However, for  
 28 purposes of the present motion, the Court must take Plaintiff's allegations as true. Nevertheless,  
 Plaintiff must be cognizant that as the Ninth Circuit noted in *Holley II*, and the Supreme Court noted in  
*Meyer*, special circumstances—beyond the mere right to control—must be present to impose vicarious  
 liability on a designated broker.

1 “Unfair Competition Law,” prohibits “any unlawful, unfair or fraudulent” business practices. “Since  
 2 section 17200 is [written] in the disjunctive, it establishes three separate types of unfair competition.  
 3 The statute prohibits practices that are either ‘unfair’ or ‘unlawful,’ or ‘fraudulent.’ “ *Pastoria v.*  
 4 *Nationwide Ins.* (2003) 112 Cal. App. 4th 1490, 1496; *see also Cel-Tech Commc’ns, Inc. v. Los Angeles*  
 5 *Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 180. Plaintiff’s alleges Defendants’ conduct was unlawful,  
 6 unfair, and deceptive.<sup>11</sup>

#### 7       **1.     “Unlawful” Prong**

8       Plaintiff alleges Hagopian’s conduct is unlawful because it violates TILA and its accompanying  
 9 regulations, codified at 12 C.F.R. § 226.1 *et seq.* Specifically, Plaintiff alleges Hagopian violated 12  
 10 C.F.R. § 226.19, by failing to provide the requisite notices of right to cancel or clearly and conspicuously  
 11 disclose the certainty of negative amortization and its effect on the payment cap. Although  
 12 Plaintiff does not set forth whether she is seeking rescission or damages under TILA, because the  
 13 Property was sold at a foreclosure sale in 2009, rescission is no longer available.<sup>12</sup> Therefore, the Court  
 14 infers Plaintiff seeks damages pursuant to § 1640(a), and violation of, among other TILA provisions, 12  
 15 C.F.R. § 226.19(b)(2)(vii), which regulates disclosure requirements relating to negative amortization  
 16 and explanation of interest rate or payment limitations.<sup>13</sup>

17       TILA was enacted by Congress to “avoid the uninformed use of credit.” 15 U.S.C. § 1601.  
 18 Through TILA, Congress “sought to protect consumers’ choice through full disclosure and to guard  
 19 against the divergent, and at times, fraudulent practices stemming from uninformed use of credit.” *King*

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20       <sup>11</sup> Plaintiff’s allegations under the UCL allege wrongful conduct against Defendants Seamless,  
 21 McDevitt, Radtke, Premiere Capital, Venegas, and Hagopian. Allegations against Hagopian only  
 concern violation of TILA.

22       <sup>12</sup> See 15 U.S.C. § 1635(f) (“An obligor’s right of rescission shall expire three years after the date  
 23 of consummation of the transaction or upon the sale of the property, whichever occurs first . . .”);  
*Jacobson v. Balboa Arms Drive Trust No. 5402 HSBC Fin. Tr.*, No. 10-CV-2195-JM (RBB), 2011 WL  
 3328487 \*6 (S.D. Cal. Aug. 1, 2011) (“any right of rescission under TILA is terminated upon  
 foreclosure sale of the property”).

25       <sup>13</sup> The Court’s prior order dismissing Plaintiff’s SAC instructed Plaintiff to allege “which  
 26 specific section or sections [of TILA] were allegedly violated.” (Doc. No. 73, p. 13:22-24) Although  
 Plaintiff’s TAC did not clearly allege which specific section of TILA was violated, she did provide a  
 27 description of the alleged wrongful conduct and provided the Court and Defendant with the  
 28 implementing regulation she believed was violated. Therefore, even though Defendant’s Reply points  
 out that TILA has 77 sections and C.F.R. § 226.19 has 31 subparts, in an abundance of caution, and to  
 ensure this case is resolved on its merits, the Court finds Plaintiff’s allegations sufficient.

v. California, 784 F.2d 910, 915 (9th Cir. 1986). In order to effectuate this purpose, TILA “has been liberally construed” in the Ninth Circuit. *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989) (citing *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974)). Even “technical or minor violations” of TILA impose liability on the creditor. *Id.* (quoting *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d 699, 704 (9th Cir. 1986)) (finding that TILA and its implementing regulations, must be “absolutely complied with and strictly enforced”). Regulation Z of the Federal Reserve Board of Governors, codified at 12 C.F.R. § 226.1 *et seq.*, implements TILA and imposes specific disclosure requirements on creditors in connection with certain loans. As applicable to this case, Regulation Z requires that the possibility of negative amortization must be clearly disclosed to the borrower, and that no disclosure may cause another disclosure to be obscured or made ambiguous. See 12 C.F.R. Pt. 226, Supp. I, ¶ 17(a)(1)–1.

Plaintiff claims Hagopian violated 12 C.F.R. § 226.19—which imposes specific disclosure requirements in connection with variable rate mortgages—by failing to clearly and conspicuously disclose: (1) that negative amortization was certain to occur; and (2) the effect of the payment cap. (TAC ¶ 56.) Subsection 226.19(b)(2)(vii) requires lenders to disclose “any rules relating to changes in the index, interest rate, payment amount, and outstanding loan balance including, for example, an explanation of interest rate or payment limitations, negative amortization, and interest rate carryover.” The Official Staff Commentary to this subsection elaborates on the requirement with respect to negative amortization:

Negative amortization and interest rate carryover. A creditor must disclose, where applicable, the possibility of negative amortization. For example, the disclosure might state, “If any of your payments is not sufficient to cover the interest due, the difference will be added to your loan amount.” . . . If a consumer is given the option to cap monthly payments that may result in negative amortization, the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal loan balance will increase) . . . C.F.R. Pt. 226.19(b)(2)(vii)(2). Many courts in the Ninth Circuit have interpreted this to mean that a borrower states a claim for violation of TILA, based on, among other deficiencies in related disclosures, the failure of the lender to clearly state that making payments pursuant to the TILDS payment schedule

1 will result in negative amortization.<sup>14</sup> Accordingly, where disclosures framed negative amortization as  
 2 merely a possibility—and were literally accurate—the failure to state that paying less than the full  
 3 amount due under the Note would result in negative amortization, violates TILA. *Velazquez v. GMAC*  
 4 *Mortgage Corp.*, 605 F. Supp. 2d 1049, 1067 (C.D. Cal. 2008)

5 Moreover, Section 226 applies equally to all loan documents, including but not limited to, the  
 6 TILDS and the actual note. This is to ensure consumers are not confused as a result of inconsistent  
 7 disclosures in various loan documents. *See, e.g., Amparan v. Plaza Home Mortgage, Inc.*, 678 F. Supp.  
 8 2d 961, 969-70 (N.D. Cal. 2008); *Plascencia v. Lending 1st Mortg.*, No. C 07-4485 CW, 2008 WL  
 9 1902698, at \*4-6 (N.D. Cal. Apr. 28, 2008) (denying motion to dismiss § 226.19 claim predicated on  
 10 alleged lack of clarity in note agreement with respect to disclosure of APR and possibility of negative  
 11 amortization); *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) (noting that where a  
 12 lender provided a borrower with both a correct and an incorrect disclosure, the disclosure was unclear in  
 13 violation of TILA).

14 Here, the TILDS Plaintiff received and signed on April 10, 2008, represented that the APR was  
 15 3.376%, describing this figure as the “[t]he cost of your credit as a yearly rate.” (Doc. No. 78; Ex. 2.)  
 16 The TILDS also stated an amount financed of \$525,869.52, with payments in the amount of \$2,328.35,  
 17 starting on July 1, 2008. (*Id.*) However, the Note signed by Plaintiff on April 25, 2008, represented that  
 18 “I will pay interest at the yearly rate of 8.000%.” (*Id.*; Ex. 3.) The Note also stated an amount financed  
 19 of \$510,000.00, with payments in the amount of \$2,219.56, starting on June 1, 2008.<sup>15</sup> Thus, as  
 20 acknowledged by Hagopian in his Reply, it is unclear if the TILDS proffered by Plaintiff bears any

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21       <sup>14</sup> *See, e.g., Romero v. Countrywide Bank, N.A.*, 740 F. Supp. 2d 1129, 1132-1133, 1136-1141  
 22 (N.D. Cal. 2010); *Ralston v. Mortgage Investors Group, Inc.*, No. C 08-536 JF, 2009 WL 688858,  
 23 \*1-\*2, \*5-\*6 (N.D. Cal., Mar. 16, 2009); *Velazquez v. GMAC Mortgage Corp.*, 605 F. Supp. 2d 1049,  
 24 1053-1056, 1064-1066 (C.D. Cal. 2008); *Pham v. T.J. Financial, Inc.*, No. CV 08-275 ABC, 2008 WL  
 3485589, \*2-\*4 (C.D. Cal., Aug. 11, 2008); *Plascencia v. Lending 1st Mortgage*, No. C 07-4485 CW  
 2008 WL 1902698, \*1-\*6 (N.D. Cal., Apr. 28, 2008).

25       <sup>15</sup> Defendant’s Reply objects to the introduction of the TILDS statement and the Note as extrinsic  
 26 evidence that may not be considered by the Court on a motion to dismiss. (Doc. No. 80, p. 5:15-22.)  
 27 However, certain written instruments attached to pleadings may be considered part of the pleading. *See*  
 28 Fed. R. Civ. P. 10(c). Even if a document is not attached to a complaint, it may be incorporated by  
 reference into a complaint if the plaintiff refers extensively to the document or the document forms the  
 basis of the plaintiff’s claim. *See Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002); *Barron v.  
 Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Here, the basis of Plaintiff’s claims concern the alleged TILA  
 violation, she referred to these documents in the TAC, and attached them to her Opposition.

1 relationship to the Note, or whether Plaintiff received an additional TILDS from Wachovia before  
 2 signing the Note. (Doc. No. 80, p. 6 n. 4.) Accordingly, at this stage in the proceeding, this inconsis-  
 3 tency renders the disclosure of the actual APR unclear, and substantiates Plaintiff's factual allegations  
 4 under TILA.

5 Moreover, Paragraph 3(B) of the Note states: "My initial monthly payment amount was selected  
 6 by me from a range of initial payment amounts approved by Lender and *may not be sufficient* to pay the  
 7 entire amount of interest accruing on the unpaid Principal balance." (Doc. No. 78; Ex. 3) (emphasis  
 8 added). Paragraph 3(E) states that: "From time to time my monthly payments may be insufficient to pay  
 9 the total amount of the monthly interest that is due. If this occurs, the amount of interest that is paid  
 10 each month, called "Deferred Interest," will be added to my Principal and will accrue interest at the  
 11 same rate as the Principal." Finally, Paragraph 3(D) states that: "my monthly payment may be changed  
 12 to an amount sufficient to pay the unpaid principal balance together with interest. . ." However,  
 13 Paragraph 3(D) never sets forth the margin that will be added to the index rate to determine the new  
 14 interest rate upon the change date. Taken together, this language infers that negative amortization could  
 15 occur if the minimum payment selected by the lender does not cover the applicable interest, but does not  
 16 appear to provide the necessary clarity required under case law in this circuit. Accordingly, in addition  
 17 to the discrepancies noted above between the TILDS and the Note, the Court finds Plaintiff has alleged a  
 18 plausible cause of action for violation of TILA and 12 C.F.R § 226.19.

## 19           2.       **"Unfair" Prong**

20       Second, Plaintiff alleges Defendants' conduct constitutes an unfair business practice because the  
 21 deceptive nature of the disclosure documents caused substantial injury that was not outweighed by any  
 22 benefits to consumers, and the disclosures were designed to be misleading to induce Plaintiff, and other  
 23 consumers like Plaintiff, to enter into loan transactions. (TAC ¶ 57.) Hagopian alleges Plaintiff's claim  
 24 must fail because she does not plead the allegation with particularity, and as a matter of law, Hagopian  
 25 has no legal duty to make any disclosures to Plaintiff.<sup>16</sup> Here, even though California appellate courts  
 26

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27       <sup>16</sup> Defendant cites to the Court's prior order dismissing claims one, two, and three, for Elder  
 28 Abuse, fraud and deceit, and breach of fiduciary duty, respectively. (Doc. No. 73.) However, the  
 Court's order never stated Hagopian did not owe Plaintiff a duty under TILA—with respect to the UCL  
 claim—and dismissed the other claims based on reasons not associated with Hagopian's duty to make

1 disagree on how to define an “unfair” act or practice in the context of a UCL consumer action, because  
 2 the Court finds Plaintiff has alleged a violation of TILA, she may be able to prove facts showing that  
 3 “the harm to the consumer” from Defendants’ conduct outweighed the solicitation’s ‘utility.’ ” *Rubio v.*  
 4 *Capital One Bank*, 613 F.3d 1195, 1205 (9th Cir. 2010) (finding that borrower who alleged a violation  
 5 of TILA also alleged a violation of the “unfair” prong under either the test currently employed by  
 6 California courts.) Accordingly, the Court finds Plaintiff has also alleged a violation under the unfair  
 7 prong.

### 8           **3.       “Deceptive/Fraudulent” Prong**

9           Finally, Plaintiff alleges Defendants’ conduct was fraudulent in that the “disclosures were  
 10 incomplete and deceptive, and that the true facts with respect to Plaintiff’s loan were not disclosed to  
 11 Plaintiff, so as to induce Plaintiff to fork over \$27,000 for a loan she could not afford.” (*Id.* at ¶ 58.)  
 12 Plaintiff further alleges that the “public would likely be deceived and were in fact deceived because the  
 13 disclosures did not explain that negative amortization was certain to incur if only the minimum  
 14 payments were made.” (*Id.* at ¶ 59.) Defendant argues Plaintiff’s claim must fail because she has failed  
 15 to state with particularity what specific conduct Defendant is accused of, how the conduct was  
 16 deceptive, or how members of the public are likely to be deceived by the alleged conduct.<sup>17</sup> The Court  
 17 does not agree.

18           Similar to allegations under TILA, allegations under the “fraudulent prong” of the UCL are  
 19 “governed by the reasonable consumer test.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th  
 20 Cir. 2008). In order to prevail, a plaintiff must demonstrate that “members of the public are likely to be  
 21 deceived.” *Id.* The deception need not be intentional. *See In re Tobacco II Cases* (2009) 46 Cal. 4th  
 22 298. As stated above, Plaintiff has set forth sufficient allegations to show that Defendants’ conduct,

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23  
 24 disclosures required by law under TILA. Moreover, as stated above, the Court finds Plaintiff has pled  
 25 sufficient facts to proceed against Hagopian under a theory of vicarious liability.

26           <sup>17</sup> Defendant further contends that “[i]t is simply beyond comprehension how Rose can take the  
 27 position that she never received any disclosures, but at the same time state she was deceived by the  
 28 language in the disclosures, then also opine that the public would be deceived by the unidentified  
 language in the disclosures.” Although the Court agrees with Defendant that Plaintiff’s allegation is  
 misleading, as Plaintiff attaches a TILDS to her opposition, the Court is willing to infer that Plaintiff  
 was inferring that she never received a TILDS that identified an interest of 8%, the same interest rate for  
 the Note.

1 including the inconsistent disclosure statements, were misleading, and would be misleading to the  
 2 reasonable consumer. Accordingly, because of the inconsistencies in the TILDS and the Note, and the  
 3 equivocal language regarding the possibility of negative amortization, the Court finds Plaintiff has stated  
 4 a plausible claim under the fraudulent prong.

5 **II. Motion For Sanctions Pursuant to Rule 11**

6 Defendant seeks Rule 11 sanctions in the form of dismissing the action as to him with prejudice,  
 7 or in the alternative, striking the TAC as to him, and awarding his reasonable attorneys' fees and  
 8 expenses incurred in defending against the TAC. In response, Plaintiff contends sanctions are not  
 9 procedurally or substantively warranted, and requests the Court order Defendant and his counsel to  
 10 show cause as to why their conduct has not violated Rule 11.

11 As stated above, because Plaintiff has sufficiently alleged a non-frivolous claim, the Court finds  
 12 sanctions unwarranted. Fed. R. Civ. P. 11(b); *Warren v. Guelker*, 29 F.3d 1386, 1388 (9th Cir. 1994)  
 13 (Rule 11 sanctions are warranted when a party files a lawsuit or motion that is frivolous, legally  
 14 unreasonable, without factual foundation, or is otherwise brought for an improper purpose). The Court  
 15 also declines Plaintiff's request to issue an order to show cause as to why sanctions should not be  
 16 imposed against Hagopian and his counsel. Nonetheless, as this case progresses, counsel for both  
 17 parties are reminded of the importance of professional courtesy, and the benefit of continuing discussions  
 18 to facilitate settlement for the benefit of their clients.

19 **CONCLUSION**

20 For the reasons stated above, the Court **DENIES** Defendant Hagopian's motion to dismiss and  
 21 **DENIES** Defendant Hagopian's motion for Rule 11 sanctions. Defendant Hagopian shall file an answer  
 22 within thirty (30) days of service of this Order.

23 **IT IS SO ORDERED.**

25 DATED: January 2, 2013

26   
 27 Hon. Anthony J. Battaglia  
 U.S. District Judge